No. 98-1275

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In the Supreme Court of the United States

October Term 1998

ROSE CONSTANTINO,

Petitioner

vs.

THE UNIVERSITY OF PITTSBURGH; ANN YURICK; KAREN MOLCAN; THE UNIVERSITY OF PITTSBURGH MEDICAL CENTER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Third Circuit correctly apply this Court's decision in *Paul v. Davis* holding that reputation alone is not a federally protected liberty or property interest under the Fourteenth Amendment?

2. Where there is no conflict whatsoever among the courts of appeals, whether there is any compelling reason to re-examine the well-established and oft-cited holding of *Paul v. Davis*?

STATEMENT OF INTERESTED PARTIES

The parties are stated correctly in the caption of the petition for a writ of certiorari.

Pursuant to S.Ct. Rule 29.6, respondent the University of Pittsburgh has no parent company or nonwholly-owned subsidiaries. UPMC Health System is the parent company of respondent University of Pittsburgh Medical Center ("UPMC"). There are no publicly held companies which own any interest in UPMC.

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Respondent respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Third Circuit. The opinion of the Court of Appeals is not published; it is reproduced in Petitioner's Appendix at 1a-6a.

COUNTERSTATEMENT OF THE CASE

Petitioner, Rose Constantino, is a faculty member in the University of Pittsburgh's School of Nursing. As part of her teaching duties within the School of Nursing, Professor Constantino supervises clinical work being done by certain School of Nursing students. During Spring Term 1996, Petitioner's clinical teaching duties were being performed on-site at the Western Psychiatric Institute and Clinic ("WPIC"), a psychiatric hospital which is part of Respondent University of Pittsburgh Medical Center ("UPMC").

In February 1996, an administrator at WPIC (Respondent Molcan) sent a letter to the Dean of the University's School of Nursing regarding Petitioner's job performance at WPIC, in which the administrator asked that Petitioner be removed from clinical supervision of nursing students at WPIC.

During this same timeframe, Petitioner was seeking a Dean's Distinguished Teaching Award within the School of Nursing. After learning of WPIC's concerns about Petitioner's performance as a clinical instructor of nursing at WPIC, Petitioner's Department Chairperson in the School of Nursing (Respondent Yurick) conveyed that information in writing to the Chair of the Dean's Distinguished Teaching Award Committee. That written communication conveyed only the fact that certain unspecified problems with

Petitioner's job performance at WPIC had been reported to the University and had resulted in Petitioner's clinical teaching responsibilities at that site being reassigned to another faculty member.

Petitioner is still employed at the University's School of Nursing as a tenured faculty member. She has not alleged the loss of any salary or pay or rank or any other tangible job benefit as a result of the aforementioned written communications regarding her job performance at WPIC.

The only federal claim at issue in this lawsuit is a claim against Petitioner's employer (the University) and Petitioner's immediate supervisor at the University (Ms. Yurick) under 42 U.S.C. § 1983 in which Petitioner alleges that the University and Ms. Yurick deprived her of procedural due process rights under the Fourteenth Amendment in connection with the above-described communications regarding her job performance at a clinical teaching site.

Upon motion by Respondents, the United States District Court for the Western District of Pennsylvania dismissed this claim with prejudice for failure to state a legally cognizable claim under Section 1983. Relying upon this Court's decision in *Paul v. Davis*, 424 U.S. 693 (1976), the District Court held that Plaintiff's claim of reputational harm was not, by itself, sufficient to constitute a claim for

deprivation of a protected liberty or property interest under the Fourteenth Amendment.[1]

The United States Court of Appeals for the Third Circuit affirmed, agreeing with the District Court that Plaintiff had not stated a claim for deprivation of a federally-protected liberty or property interest.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS CORRECTLY APPLIED THIS COURT'S DECISION IN *PAUL V. DAVIS* IN HOLDING THAT REPUTATION ALONE IS NOT A FEDERALLY PROTECTED LIBERTY OR PROPERTY INTEREST UNDER THE FOURTEENTH AMENDMENT.

In *Paul v. Davis*, 424 U.S. 693 (1976), this Court held that reputation alone, apart from more tangible interests, is neither a federally protected "liberty" interest nor a federally protected "property" interest sufficient to invoke the protections of the Fourteenth Amendment's Due Process Clause. In her petition for certiorari, Petitioner contends that because "right to reputation" is a protected interest under the

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1 Plaintiff's complaint also contained state law defamation claims against all four respondents. The District Court dismissed those state law claims without prejudice and they are presently pending in the Court of Common Pleas of Allegheny County, Pennsylvania.

Pennsylvania Constitution, that is enough to trigger a protected interest under the Federal Constitution. Petitioner relies on the Pennsylvania Commonwealth Court's decision in *Pennsylvania Bar Ass'n v. Commonwealth*, 147 Pa. Commw. 351, 607 A.2d 850 (1992), but her reliance is misplaced.

The Pennsylvania Commonwealth Court's decision in *Pennsylvania Bar Ass'n* addressed an action exclusively brought under the Pennsylvania Constitution challenging certain amendments to the Pennsylvania Motor Vehicle Code on the basis of the reputational protections contained in the state constitution. *Pennsylvania Bar* merely recognizes the fact that the Pennsylvania Constitution protects citizens' interest in their reputations, especially in situations where they are not aware that their reputations are being impugned. *Id.* at 362-63, 607 A.2d at 855-56. It does not support Petitioner's attempt to state a federal Fourteenth Amendment claim on the basis of alleged reputational injury alone.

In fact, the Commonwealth Court in *Pennsylvania Bar Ass'n* expressly distinguished federal due process claims from state law reputational harm claims. Specifically, the Commonwealth Court's discussion of the reputational protections of the Pennsylvania Constitution was prefaced by the comment that such was "in the context of a [state law] defamation suit." *Id.*, 607 A.2d at 855-56. The court recognized that federal claims such as Petitioner's, on the other hand, were governed by this Court's holding in *Paul* that "a threat to reputation, when not combined with a threat to some other 'more tangible' interest, does not invoke the procedural protections of the Due Process Clause of the United States Constitution." *Id.* at 362, 607 A.2d at 855.

Petitioner's proffered interpretation of *Paul* is simply incorrect. In *Paul*, this Court analyzed at length its prior decisions on the subject of whether reputation alone was protected by the Fourteenth Amendment -- and issued a general holding that reputation alone is not an interest protected by the Fourteenth Amendment. In the course of that analysis, the Court stated:

> While we have in a number of our prior cases pointed out the frequently drastic effect of the "stigma" which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interest such as employment, is either "liberty" or "property" by itself sufficient to invoke the procedural protection of the Due Process Clause. . . . [W]e think that the weight of our decisions establishes no constitutional doctrine converting every defamation by a public official into a deprivation of liberty within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.
>
> * * * *
>
> Two things appear from the line of cases beginning [in 1946]. The Court has recognized the serious damage that could be inflicted by branding a government employee as "disloyal," and thereby stigmatizing his good name. ***But the***

> ***Court has <u>never</u> held that the mere defamation of an individual, whether by branding him disloyal or otherwise, was sufficient to invoke the guarantees of procedural due process absent an accompanying loss of government employment.***

424 U.S. at 701-06 (emphasis added; footnote omitted).[2]

Petitioner's misinterpretation of *Paul* also is contrary to the long line of cases from various jurisdictions citing *Paul* repeatedly for the settled proposition that reputation alone is not a federally protected interest. For example, in a case arising in Pennsylvania, *Clark v. Township of Falls*, 890 F.2d 611 (3d Cir. 1989), the Court of Appeals for the Third

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2 In her petition, Professor Constantino does not argue (as she did unsuccessfully in the courts below) that she has met the "reputation plus" standard of *Paul v. Davis*. Hence, Petitioner's reference in her "Questions Presented for Review" to the termination of certain of her teaching responsibilities and the reference in her "Statement of the Case" to the denial of a teaching award and the alleged impairment of her opportunity for promotion to full professor are not pertinent to the issues for which Petitioner is seeking review. In any event, the Court of Appeals correctly held that Petitioner has no property interest in teaching awards "which are conferred in the university's discretion, and no property interest in receipt of a future promotion in rank or increase in her salary." App. at 5a.

Circuit followed *Paul* and unequivocally held that reputation alone was not a federally protected interest for purposes of that plaintiff's Section 1983 claim. After reviewing its own prior decisions holding that reputation alone was not a federally protected interest, the Third Circuit reaffirmed that settled principle, holding that the plaintiff therein failed to establish a federally protected interest because he failed to show that the defendants' alleged defamatory remarks were coupled with the loss of any more tangible interest. 890 F.2d at 620.

Finally, Petitioner's position, if accepted, would federalize every defamation claim against public sector entities and officials. This Court in *Paul* expressly addressed and rejected such an expansive reading of the Fourteenth Amendment's Due Process Clause because it "would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States," and would ultimately create a general federal tort law from congressional civil rights statutes. 424 U.S. at 698-701. Hence, this Court has already properly concluded that "the procedural guarantees of the Due Process Clause cannot be the source for such law." *Id.* at 701.

For the reasons discussed below, there is no reason for the Court to re-examine that proposition.

II.

THE QUESTIONS PRESENTED BY PETITIONER ARE NOT SUFFICIENTLY IMPORTANT TO WARRANT REVIEW BY THIS COURT.

This case does not warrant review by this Court because the decision below rests squarely on the well-reasoned and established principle of *Paul v. Davis* that reputation alone is not sufficient to create a federally protected liberty or property interest. There is no compelling reason to re-examine *Paul*.[3]

This Court itself has cited *Paul* with approval on numerous occasions, most recently in May of 1998 in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) and notably in *Siegert v. Gilley*, 500 U.S. 226 (1991) where the Court wrote that "[o]ur decision in *Paul v. Davis* did not turn, however, on the state of mind of the defendant, but on the lack of any constitutional protection for the interest in reputation." *Id.* at 234 (emphasis added).

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3 Petitioner argues that prior decisions of this Court concerning Section 1983 claims somehow clash with *Paul*. In support of this argument, Petitioner cites two cases, *Monroe v. Pape*, 365 U.S. 167 (1961) and *United States v. Classic*, 313 U.S. 299 (1941). Both of these cases, however, are entirely consistent with *Paul*, and neither even addresses the subject of a federally protected constitutional interest in one's reputation.

Further, the decision by the court of appeals below is not in conflict with any decision by another United States court of appeals nor does the decision below conflict with any decision by a state court of last resort. Indeed, as discussed above, the decision below is entirely consistent with a long line of decisions applying this Court's explicit holding in *Paul* that reputation alone is not a federally protected liberty or property interest.

The petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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